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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RON CHAMPION and
ATTORNEY GENERAL OF OKLAHOMA,
Petitioners,

v.

DAVID LEE SACK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Oklahoma's statutory scheme and appellate rules require defendants to raise all claims that can be raised, including incompetency claims and ineffective assistance of trial counsel claims, in their initial direct state appeal. Pursuant to the statutory scheme, defendants are permitted, after the conclusion of direct appeal, to file an application for post-conviction relief but may raise only claims that could not have been raised on direct appeal such as ineffective assistance of appellate counsel or claims based upon newly discovered evidence. However, defendants are not permitted to raise incompetency claims nor ineffectiveness of trial counsel claims in post-conviction applications unless the factual basis of the claim could not have been discovered through due diligence at the time of the direct appeal. Also, in all cases to appeal from a plea of guilty in Oklahoma, a defendant must first apply to withdraw the guilty plea. In light of this statutory scheme, the questions presented are:

(1) Whether ineffective assistance of counsel claims can *never* be procedurally barred in federal habeas corpus actions pursuant to a state procedural rule that bars the claims if the claims are not raised on direct state appeal or at the first available opportunity.

(2) Whether the federal circuit court of appeals' finding that there is *not* a procedure in Oklahoma for appellants to develop facts not contained in the appellate record supersedes an opposite finding by Oklahoma's court of last resort on the issue which found that there *is* a procedure for developing such facts.

(3) Whether incompetency claims can *never* be forfeited in federal habeas corpus actions pursuant to a state procedural rule because such claims are "substantive" in nature.

(4) Whether the federal Tenth Circuit Court of Appeals can overrule and/or vilipend the interpretation of Oklahoma appellate law and procedure by the Oklahoma Court of Criminal Appeals, the state's court of last resort in criminal cases, and disrespect a state procedural bar.

(5) Whether the federal Tenth Circuit Court of Appeals can require Oklahoma to adopt the federal system's appellate procedure, which mandates that all ineffectiveness of counsel claims be brought in collateral attacks of criminal convictions and not on direct appeal, or forfeit a state procedural bar of such claims in federal habeas corpus actions.

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PETITION FOR WRIT OF CERTIORARI

Ron Champion and the Attorney General of Oklahoma, Petitioners, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

A. STATE COURT PROCEEDINGS:

The May 11, 1992 Opinion of the state district court which denied post-conviction relief on the claims at issue in this federal habeas corpus action in the first instance is unreported but is reprinted at pages 35A to 56A of the accompanying appendix (Pet. App.) to this petition. The August 12, 1992 Opinion of the Court of Criminal Appeals which affirmed the state district court and procedurally barred all claims, except the ineffective assistance of appellate counsel claim, in this case is also unreported. Pet. App. at 29A to 34A.

B. FEDERAL DISTRICT COURT (INITIAL) PROCEEDINGS:

The September 27, 1993 Order of the United States District Court for the Eastern District of Oklahoma which adopted the Magistrate Judge's Report and Recommendation is unreported. Pet. App. at 23A to 24A. The United States Magistrate Judge's Report and Recommendation, which was issued on July 27, 1993, and applied a procedural bar to the claims, including the ineffectiveness of trial counsel claims, which were raised in this federal habeas corpus action, is unreported. Pet. App. at 25A to 28A.

C: TENTH CIRCUIT COURT OF APPEALS (INITIAL) ORDER:

The October 19, 1994, Order of the Tenth Circuit Court of Appeals, which remanded the case to the federal district court to determine if Oklahoma bars collateral review of ineffective assistance of trial counsel claims that realistically could not have been raised on direct appeal, is unreported. Pet. App. at 58A to 70A.

D: FEDERAL DISTRICT COURT (SUBSEQUENT) PROCEEDINGS:

The January 17, 1997 Order of the United States District Court for the Eastern District of Oklahoma, which found that Oklahoma does not bar collateral review of ineffectiveness claims that realistically could not have been raised on direct state appeal, and therefore found the claims properly barred and denied the writ is unreported. Pet. App. 16A to 22A.

E. TENTH CIRCUIT COURT OF APPEALS (FINAL) ORDER:

The Tenth Circuit Court of Appeals Order of January 7, 1998, sought to be reviewed in this petition and which reversed the district court and rejected the application of a procedural bar to ineffectiveness of trial counsel claims and any incompetency claims, is unreported. Pet. App. 1A to 15A. The February 6, 1998, Order of the United States Court of Appeals for the Tenth Circuit denying the Petition for Rehearing and Suggestion for Rehearing En Banc is also unreported. Pet. App. 57A..

STATEMENT OF JURISDICTION

The Judgment and Opinion of the Court of Appeals was entered on January 7, 1998. Pet. App. 1A to 15A. The Order denying Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on February 6, 1998. Pet. App. 57A . The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

U.S. Const. amend. XIV (Section 1):

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

Okla. Stat. Tit. 22, § 1080 (1981): Pet. App. at 71A.

Okla. Stat. Tit. 22, § 1086 (1981): Pet. App. at 73A.

Okla. Stat. Tit. 22, Ch.18, App., Rule 4.1 of the *Rules of the Oklahoma Court of Criminal Appeals* (Supp.1990): Pet. App. at 74A. to 75A.

Okla. Stat. Tit. 22, Ch. 18, App., Rule 4.2 of the *Rules of the Oklahoma Court of Criminal Appeals* (Supp.1997): Pet. App. at 76A to 77A.

Okla. Stat. Tit. 22, § 1051 (1981): Pet.App. at 78A to 79A.

Okla. Stat. Tit. 22, § 1054 (1981): Pet. App. at 80A.

STATEMENT OF THE CASE

This case brings before the Court important issues involving comity and federalism including the question whether Oklahoma may implement and interpret its own state appellate procedures and rules. To resolve part of these issues, this case presents this Court with the opportunity to resolve a conflict between a decision of the Tenth Circuit Court of Appeals and the Oklahoma court of last resort in criminal cases. Further, this case presents this Court with the opportunity to resolve a split in the circuit courts. Additionally, this case presents this Court with the opportunity to-resolve a conflict between the decisions of the Tenth Circuit Court of Appeals and the holdings of this Court. The jurisdiction of the federal District Court was based on 28 U.S.C. § 2241.

First, this case poses the question whether a federal court of appeals can rule as a matter of fact that there is no fact-finding process available in the appellate process in Oklahoma and thereby find as a matter of law that the state procedural bar of ineffective assistance of counsel claims (which require further fact-finding) is inadequate, despite that Oklahoma's court of last resort in this arena has held, and shown, that there is a fact-finding procedure available to develop such claims for appellants. Second, this case provides this Court with the opportunity to resolve an apparent split in the federal circuit courts since all other circuits that have addressed the issue hold that any federal claim can be defaulted pursuant to

a state procedural rule, whereas the Tenth Circuit Court of Appeals has held that this general rule does not apply to ineffectiveness claims and incompetency claims. Third, this case presents the question whether the federal court of appeals, by holding that incompetency claims can never be procedurally barred, because they are substantive claims, overrules or limits this Court's holding in ***Coleman v. Thompson***, 501 U.S. 722, 729, 111 S.Ct. 2546, 155 L.Ed.2d 640 (1991), wherein this Court held that a state procedural bar applies whether the state law ground is substantive or procedural.

A. State Trial Court Proceedings:

Respondent, David Sack, pleaded guilty to Second Degree Murder, After Former Convictions of Two or More Felonies[1] and was sentenced to forty (40) years imprisonment on December 3, 1990. On January 2, 1992, Respondent filed an application for post-conviction relief in the state district court in which he raised at least 39 grounds for relief. On May 11, 1992, the state district court denied post-conviction relief finding, *inter alia*, that Respondent had not sought to withdraw his guilty pleas and his claims were procedurally barred. Pet.App. at 46A. On August 12, 1992, the Oklahoma Court of Criminal Appeals affirmed the trial court's denial and found that Respondent's claims, including his ineffective assistance of trial counsel claims, were procedurally barred pursuant to the state statutes for failing to show that he was denied a direct appeal through no fault of his own. (Pet. App. at 33A).

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[1]Respondent also pleaded guilty to Knowingly Possessing an Oklahoma Driver's License with a Photograph of Person Other Than Named Person and received a three years sentence that ran concurrent with the murder conviction but he has discharged this sentence.

B. Initial Proceedings in The Federal District Court:

Respondent then filed the instant action in federal habeas corpus in which the federal district court initially applied a procedural bar to his habeas claims. Pet. App. at 27A. The district court found the claims were procedurally barred by the state courts and they were, therefore, barred from review in federal habeas corpus. ***Id***.

C Initial Proceedings in Federal Appellate Court:

The Tenth Circuit Court of Appeals vacated the district court's decision and remanded the case to the district court to determine "if Oklahoma bars collateral review of ineffective assistance claims . . . that realistically could not have been raised on direct appeal . . .." Pet. App. at 69A. The Tenth Circuit Court of Appeals was concerned with the question whether Oklahoma's procedural bar of ineffective assistance of counsel claims. that were not raised on direct appeal. was adequate in light of this Court notation in ***Kimmelman v. Morrison***, 477 U.S. 365, 378 (1986), that "restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation." Pet. App. at 67A. At about the same time, the Tenth Circuit Court of Appeals handed down its opinion in ***Breechen v. Reynolds***, 41 F.3d 1343, 1363 (10th Cir. 1994), wherein the federal court of appeals found Oklahoma's procedural bar of ineffective assistance claims was not adequate to bar federal habeas review because state appellants were not able to develop facts during their state appeals to support ineffectiveness claims.

D. Second Proceedings in Federal District Court:

While on remand to the district court, the Oklahoma Court of Criminal Appeals fastidiously considered the ***Breechen*** opinion and determined that the Tenth Circuit Court of Appeals had misinterpreted state appellate law and procedure. ***Berget v. State***, 907 P.2d 1078, 1084-85 (Okla.Crim.App. 1995). The ***Berget*** Court held that a mechanism was in place with which appellants could further develop facts on appeal to support their ineffectiveness claims. ***Id***. at 1085. The ***Berget*** court found that, whether the claim was ineffectiveness or any other claim, ". . . if the proposition of error is dependent upon matters not presented to the trial court, and which are not included in the record on appeal, appellants should take advantage of the very vehicle meant to deal with these issues by raising the proposition of error and simultaneously requesting an evidentiary hearing on the matter"). ***Id***. In light of ***Berget***, the federal district court determined that Oklahoma did not bar collateral review of ineffective assistance claims that realistically could not have been raised on direct appeal and denied the writ applying a procedural bar. Pet. App. at 18A to 19A.

E. Second Proceedings in Federal Appellate Court:

Respondent again appealed the district court's denial of the writ of habeas corpus. The Court of Appeals reversed the district court and remanded the case back to address Respondent's claims of ineffective assistance of counsel as well as his incompetency claim. Pet. App. at 1A to 15A.

The Court of Appeals held that Oklahoma's procedural bar of ineffective assistance claims was not adequate citing its holding in ***Breechen***. Pet. App. at 13A. The Panel for the Court of Appeals noted its inability to overrule the other Panel's decision in ***Breechen***. Pet. App. at 14A.

Nevertheless, Petitioner's application for rehearing and suggestion for *en banc* rehearing was denied. Pet. App. at 57A .

The Court of Appeals also held that Respondent's claim that he was incompetent at the time he entered his guilty plea could not be procedurally barred citing its holdings in ***Nguyen v. Reynolds***, No. 96-5254, 197 WL 693685, at * 4 (10th Nov.7, 1997) and ***Sena v. New Mexico State Prison***, 109 F.3d 652, 654 (10th Cir.1997). Pet. App. at 9A. The Court of Appeals held that "[a] state court determination that [Respondent] defaulted this claim by failing to raise it on direct appeal would not preclude federal habeas review." Pet. App. at 9A.

In ***Sena***, the Court of Appeals held that where a defendant claims he was incompetent at the time of a guilty plea, a "failure to appeal that substantive claim in the state court, then, does not bar federal review. ***Sena***, 109 F.3d at 654. The Court of Appeals expanded this ruling to all claims of incompetency in ***Nguyen***. Acknowledging that this Court in ***Coleman v. Thompson***, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991), held that federal habeas review of claims which had been defaulted in state courts is barred absent a showing of "cause and prejudice", the Court of Appeals held "this general rule did not apply to substantive mental competency claims." ***Nguyen***, at 1346.

REASONS FOR GRANTING THE WRIT

The Court's review of this matter is necessary because:

A. The United States Court of Appeals for the Tenth Circuit has entered a decision in conflict with the decisions of other United States courts of appeals on the same important matter, and since this matter is frequently a subject of federal habeas litigation, the lower courts need this Court's guidance on the issues, particularly since there is a split in the circuits on the issues;

B. The United States Court of Appeals has decided an important federal question in a way that conflicts with a decision of the Oklahoma Court of Criminal Appeals, the state court of last resort;

C. The United States Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court; and,

D. The United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

A. The United States Court of Appeals for the Tenth Circuit Has Entered a Decision in Conflict With The Decisions of Other United States Courts of Appeals On The Same Important Matter, and Since This Matter is Frequently a Subject of Federal Habeas Litigation, the Lower Courts Need This Court's Guidance on the Issues, Particularly Since There is a Split in the Circuits On The Issues.

This Court, in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions, has held that a procedural default doctrine applies to

bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement. ***Coleman v. Thompson***, 501 U.S. 722, 729-30 (1991). In Oklahoma a prisoner must bring ineffectiveness claims at the first available opportunity, usually on direct appeal when they have the right to new counsel, or forfeit the claims. ***Berget v. State***, 907 P.2d 1078 (Okla.Crim. App.1995) (Court excluded appellate counsel claims or same counsel claims). The Tenth Circuit Court of Appeals held that ineffective assistance of counsel claims cannot be defaulted pursuant to Oklahoma's procedural requirement. Pet. App. at 13A to 14A. ***See also***, ***Breechen v. Reynolds***, 41 F.3d 1343, 1363 (10th Cir.1994). This holding conflicts with several other circuits. ***Caswell v. Ryan***, 953 F.2d 853, 860 (3rd Cir.1992); ***U.S. ex rel. Simmons v. Gramley***, 915 F.2d 1128, 1132-33 (7th Cir.1990); ***McKinnon v. Lockhart***, 921 F.2d 830, 832-33 (8th Cir.1990); ***See also***, ***McCoy v. Newsome***, 953 F.2d 1252, 1259 (11th Cir.1992) (Court held cause and prejudice requirement applied to all cases in which a petitioner had defaulted his federal claims in state court); ***Billy-Eko v. U.S.***, 968 F.2d 281, 282-83 (2nd Cir.1992) (Ineffective assistance claims barred in federal habeas for failing to raise claims in direct state appeal as required by state procedural rule).

B. The United States Court of Appeals Has Decided An Important Federal Question In A Way That Conflicts With A Decision Of The Oklahoma Court of Criminal Appeals, The State Court of Last Resort.

The Tenth Circuit Court of Appeals, in the decision below, concluded that claims of ineffective assistance of counsel which had been defaulted in the state courts, cannot be barred from federal habeas review. Pet. App. at 13A to 14A. The Tenth Circuit Court of Appeals found that

Oklahoma's procedural bar of ineffective assistance claims did not meet the "adequate" prong of ***Coleman***. ***Breechen v. Reynolds***, 41 F.3d 1343, 1363 (10th Cir.1994). Specifically, the ***Breechen*** court found that Oklahoma presented petitioner's with a "Hobson's choice" of either raising ineffectiveness claims "on direct appeal, with new counsel ***but without the benefit of additional fact-finding***, or have the claim[s] forfeited under state law." ***Breechen***, at 1364. (emphasis added).

Subsequently, the Oklahoma Court of Criminal Appeals, which is the state court of last resort in criminal cases, found the Tenth Circuit Court of Appeals' interpretation of Oklahoma law was simply wrong. The Oklahoma Court of Criminal Appeals held that a mechanism was in place with which appellants could further develop facts on appeal to support their ineffectiveness claims. ***Berget v. State***, 907 P.2d 1078, 1084-85 (Okla.Crim.App. 1995). The ***Berget*** court found that, whether the claim was ineffectiveness or any other claim, ". . . if the proposition of error is dependent upon matters not presented to the trial court, and which are not included in the record on appeal, appellants should take advantage of the very vehicle meant to deal with these issues by raising the proposition of error and simultaneously requesting an evidentiary hearing on the matter". ***Id.*** at 1085. The Tenth Circuit Court of Appeals decided the case at bar after and despite the holding of ***Berget***. Pet. App. at 14A. Thus, the Tenth Circuit Court of Appeals' interpretation of Oklahoma's appellate procedural rules directly conflicts with the interpretation of the same rules by the Oklahoma Court of Criminal Appeals.

C. The United States Court of Appeals Has Decided An Important Federal Question in a Way That Conflicts With Relevant Decisions of This Court.

(1) Ineffective Assistance of Counsel Claims:

In this case, the Oklahoma Court of Criminal Appeals clearly barred Respondent's ineffective assistance of trial counsel claims. Pet. App. at 32A to 33A. The Tenth Circuit Court of Appeals decided that the ineffective assistance claims could not be procedurally barred from federal habeas review. Pet. App. at 12A to 15A. Although the Tenth Circuit Court of Appeals cited its holding in ***Breechen*** to underpin its conclusion, in ***Breechen*** the Tenth Circuit Court of Appeals relied upon its conclusion that prisoners could not develop a factual basis for ineffectiveness claims on direct appeal to repudiate the state procedural bar. However, the court of appeals has expanded its refusal to respect Oklahoma's procedural bar to include any and all claims of ineffective assistance of counsel, even if the claims, such as Respondent's, do not require additional fact-finding and could be resolved by resort to the record. ***Brewer v Reynolds***, 51 F.3d 1519, 1522 (10th Cir.1995).

In any event, the Tenth Circuit Court of Appeals refused to apply the procedural bar to Respondent's ineffective assistance of trial counsel claims. This holding conflicts with this Court's decision in ***Coleman v. Thompson***, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). In ***Coleman***, this Court recognized the States' sovereign power to punish offenders and the high costs of federal intrusions into state criminal trials where a state prisoner has defaulted adjudication of his federal constitutional claims. ***Coleman***, 501 U.S. at 749. "Because these costs ***do not depend on the type of claim*** a prisoner raised, [this Court] reaffirmed that a state procedural default of ***any*** federal claim will bar federal

habeas unless the petitioner demonstrates cause and actual prejudice." ***Id.*** (emphasis added). Therefore, the Tenth Circuit Court of Appeals opinion that ineffectiveness claims are excluded from a state procedural bar directly conflicts with this Court's decision.

(2) Incompetency Claims:

Respondent raised a claim that he was incompetent at the time of his guilty plea in his post-conviction relief application filed thirteen months after his plea had been entered. Pet. App. at 49A. The Oklahoma Court of Criminal Appeals found this claim was procedurally barred. Pet. App. at 29A to 34A.

The Tenth Circuit Court of Appeals decided that Respondent's incompetency claim cannot be procedurally barred. Pet. App. at 9A. The only explanation offered for this holding is that the claims are "substantive" in nature and therefore cannot be procedurally barred. ***Id.*** The Tenth Circuit Court of Appeals cited its holding in ***Sena v. New Mexico State Prison***, 109 F.3d 652, 654 (10th Cir.1997), wherein the federal appellate court found that procedural defaults do not apply to substantive due process claims. ***Sena***, 109 F.3d at 654.

However, this Court has held that federal habeas review of claims by state prisoners is precluded where "a question of federal law decided by a state court ... rests on a state law ground that is independent of the federal question and adequate to support the judgment." ***Coleman v. Thompson***, 501 U.S. 722, 729 (1991). "The doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." ***Id.*** at 729-30. "This rule applies whether the state law ground is substantive or

procedural." ***Id.*** at 729. Thus, the opinion of the Tenth Circuit Court of Appeals directly conflicts with this Court's holding in ***Coleman***.

D. The United States Court of Appeals Has So Far Departed From The Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Supervisory Power.

The decision of the United States Court of Appeals for the Tenth Circuit to disregard Oklahoma's appellate procedural requirements raises important questions of comity and federalism. The Court of Appeals has opened the flood gates on incompetency claims and ineffectiveness claims that were not properly raised in the state courts. State procedural rules prohibit bringing claims in an untimely manner. These rules entitle prisoners to bring claims that require factual findings in the state courts but mandate that they be made in a timely manner. The Tenth Circuit Court of Appeals' indifference to these procedural rules permits resurrection of the claims in the federal district courts where additional fact-finding, long after the events have grown stale, is ill-suited.

The Tenth Circuit Court of Appeals underpinned its decision in ***Breechen,*** not to bar ineffectiveness claims, with the notion that this Court created a standardless policy in ***Kimmelman v. Morrison***, 477 U.S. 365 (1986) regarding the ineffective assistance doctrine which operates as "open sesame" forcing review of closed cases and defying all attempts at finality. ***U. S. v. Galloway***, 56 F.3d 1239, 1242 (10th Cir.1995). The Tenth Circuit Court of Appeals remarked in ***Galloway*** that further factual development of ineffective assistance claims will be required in all but rare cases and opined that "[e]ven if evidence is not necessary, at the very least counsel accused of deficient performance can explain their reasoning and actions." ***Galloway*** at 1240. It is clear

then that the Tenth Circuit Court of Appeals believes that this Court requires a fact-finding mission be undertaken in virtually all cases where the effectiveness of counsel has been challenged by a prisoner. ***But see***, ***Strickland v. Washington***, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984), ("The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense").

Although ***Galloway*** was a federal case, the Tenth Circuit brought this reasoning over into state convictions in ***Osborn v. Shillinger***, 861 F.2d 612, 622-23 (10th Cir.1988). In ***Osborn***, the Tenth Circuit Court of Appeals held ineffective assistance claims could not be procedurally barred for failing to raise the claims on direct state appeal because, aside from the notion that such claims need further factual development, "the Supreme Court has held that ineffective assistance claims may be brought for the first time collaterally." ***Osborn v. Shillinger***, 861 F.2d at 622. This notion was carried forward into the ***Breechen*** analysis wherein the ***Breechen*** court cited ***Osborn***. ***Breechen v. Reynolds***, 41 F.3d at 1363.

Therefore, the Tenth Circuit Court of Appeals has created a requirement for Oklahoma to adopt the federal rule that ineffective assistance claims cannot be brought on direct appeal or forfeit a state procedural bar of such claims. The idea that ineffective assistance claims generally require the targeted counsel to come forward with evidence or explanations for his or her tactics and that such claims are constitutionally required to be brought in collateral proceedings springs from the Court of Appeal's application of this Court's holdings in ***Strickland*** and ***Kimmelman***.

Accordingly, it is imperative for this Court to provide guidance and direction on whether the federal court of appeals has departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power, or whether Oklahoma must scrap its current appellate procedure and/or make adjustments to that procedure in order to accommodate for incompetency and ineffectiveness claims that have not been otherwise timely raised.

Oklahoma courts diligently safeguard and protect rights secured by both the state and federal constitutions. Nonetheless, the state courts have procedural rules to provide for the orderly disposition of criminal cases. These rules must be followed consistently to provide for the equal application and protection of the laws. Oklahoma looks to this Court for enforcement of its sovereign power to provide a constitutionally adequate appellate procedure.

CONCLUSION

For the reasons stated above, the Petitioners, Ron Champion and the Attorney General for the State of Oklahoma, respectfully requests this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APRIL, 1998

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APPENDIX

APPENDIX A

United States Court of Appeals
Tenth Circuit

FILED JAN 7 1998
PATRICK FISHER

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DAVID LEE SACK,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	No. 97-7017
	)	(D.C. No. 92-CV-586-S)
RON CHAMPION, Warden; ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,	)	(E.D. Okla.)
	)	
Respondents-Appellees.	)	

ORDER AND JUDGMENT*

Before BALDOCK, BARRETT, and MURPHY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Petitioner appeals the district court's decision dismissing his habeas claims as procedurally barred. Petitioner pleaded guilty to second degree murder, see Okla. Stat. Ann. tit. 21, § 701.8, and possession of a fictitious driver's license, see id. tit. 47, § 6-301(2)(c), both after two or more former felony convictions. He did not file a motion to withdraw his guilty plea nor did he pursue a direct appeal. He did file a petition for

state post-conviction relief, which the state court denied, after ruling that petitioner was procedurally barred from seeking post-conviction relief because he had failed to take a direct appeal.

Petitioner then filed a federal habeas petition, see 28 U.S.C. § 2254, asserting numerous grounds for relief. The district court dismissed these claims as procedurally barred, based upon petitioner's failure to take a direct appeal. This court vacated that decision and remanded the case for the district court to address petitioner's ineffective assistance of counsel claims. See Sack v. Champion, No. 94-7018 (10th Cir. Oct.19, 1994). On remand, the district court again dismissed petitioner's ineffective assistance claims as procedurally barred. We reverse that dismissal in part

and remand for the district court to consider the merits of petitioner's claims.

In order to preclude federal habeas review, a state procedural bar must be both adequate and independent of federal law considerations. See Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). While there is no question that the Oklahoma procedural bar at issue here is independent of federal law concerns, see Brecheen v. Reynolds, 41 F.3d 1343, 1363 (10th Cir. 1994), it is not adequate to bar federal habeas review of petitioner's claims.

An adequate state law ground is one that state courts have applied strictly, regularly and consistently. See Johnson v. Mississippi, 486 U.S. 578, 587 (1988). Such a rule must be firmly established and regularly followed, and must be applied to all similar claims in

an evenhanded manner in the majority of cases. See Messer v. Roberts, 74 F.3d 1009, 1015 (10th Cir. 1996). Further, a state law ground will be inadequate if it deprives a criminal defendant of any meaningful review of his claims. See Brecheen, 41 F.3d at 1364. The question of when and how a state procedural default precludes federal habeas relief is a matter of federal law. See Johnson, 486 U.S. at 587.

On appeal, petitioner asserts four categories of claims. First, he argues that the trial court lacked subject matter jurisdiction over his prosecution, both because the trial court's docket sheet did not indicate that he had been arraigned and because the criminal informations charging his former felony convictions, both in this case and in his prior cases, were not verified as required by Oklahoma law. See generally

Buis v. State, 792 P.2d 427, 428-31 (Okla. Crim. App. 1990) (when required under Oklahoma law, verification of charging document is jurisdictional prerequisite). Oklahoma courts have consistently held that issues of subject matter jurisdiction are not waived by failing to raise them on direct appeal. See, e.g., Wallace v. State, 935 P.2d 366, 372 (Okla. Crim. App.), cert. denied, 117 S. Ct. 2489 (1997); Buis, 792 P.2d at 428. Thus, a state post-conviction determination that petitioner defaulted his jurisdictional claims by not raising them on direct appeal would not represent an adequate state procedural bar and, therefore, would not preclude federal habeas review. See Johnson, 486 U.S. at 587, 589 (state court's application of procedural bar, contrary to weight of state authority, was not adequate state law ground).

In this case, however, although petitioner characterizes these claims as jurisdictional, they do not, as a matter of law, implicate the trial court's subject matter jurisdiction. See, e.g., Lynch v. State, 909 P.2d 800, 804 (Okla. Crim. App. 1995) (Oklahoma statutory and case law does not require verification of second part of criminal information, charging prior convictions for sentence enhancement purposes); Henderson v. State, 743 P.2d 1092, 1095 (Okla. Crim. App. 1987) (irregularities in arraignment are not jurisdictional). Because Oklahoma courts consistently bar nonjurisdictional post-conviction claims that could have been, but were not, raised on direct appeal, see, e.g., Revilla v. State, 946 P.2d 262, 264 (Okla. Crim. App. 1997) (applying Oklahoma Uniform Post-Conviction Procedure Act, see Okla.

State. Ann. tit. 22, §§ 1080-89), and cases cited therein, the district court did not err in concluding that these claims are procedurally barred, based upon an adequate state law ground.

Further, because these claims are legally meritless, petitioner is unable to establish the prejudice necessary to enable the district court to address these defaulted claims. See Duvall v. Reynolds, No. 96-6329, 1997 WL 758810, at #26 (10th Cir. Dec. 10, 1997). Nor has he made the colorable showing of his factual innocence required to meet the fundamental miscarriage of justice exception to defaulted claims. See Demarest v. Price, No. 95-1535, 1997 WL 746288, at #20 (10th Cir. Dec. 3, 1997). The district court's denial of habeas relief on these claims is, therefore, affirmed.

In his second category of claims, petitioner asserts that he was incompetent at the time he entered his guilty plea. A state court determination that petitioner defaulted this claim by failing to raise it on direct appeal would not preclude federal habeas review. See Nguyen v. Reynolds, No. 96-5254, 1997 WL 693686, at #4 (10th Cir. Nov. 7, 1997); see also Sena v. New Mexico State Prison, 109 F.3d 652, 654 (10th Cir. 1997) (addressing merits of § 2254 substantive due process claim that petitioner, at time he entered guilty plea, was incompetent to stand trial). On remand, the district court should address the merits of this issue.

Third, petitioner argues that his failure to file a motion to withdraw his guilty plea and to perfect a direct appeal was due to his attorney's ineffective

representation. See generally, Randall v. State, 861 P.2d 314, 315-16 (Okla. Crim. App. 1993) (addressing state procedure for attacking guilty plea through motion for withdrawal and on petition for certiorari to Oklahoma Court of Criminal Appeals). The state post-conviction court determined, nonetheless, that petitioner was barred from asserting these ineffective assistance claims because he had failed to take a direct appeal. This circular reasoning denied petitioner any meaningful opportunity for review of his claims that his attorneys' ineffectiveness caused him to lose his direct appeal and, therefore, is inadequate to preclude federal habeas review. See Brecheen, 41 F.2d at 1364; see also Hannon v. Maschner, 981 F.2d 1142, 1145 (10th Cir. 1992); cf. Parkhurst v. Shillinger, 128 F.3d 1366, 1370-71 (10th Cir. 1997) (holding that

petitioner's ineffective assistance claims were procedurally barred, where, although petitioner had opportunity to obtain equivalent of direct review of these claims in state post-conviction proceedings, he failed to pursue that opportunity).

On remand, therefore, the district court should address the merits of petitioner's claims alleging that his failure to pursue a direct appeal were the result of counsel's constitutionally ineffective representation. See generally Romero v. Tansy, 46 F.3d 1024, 1031 (10th Cir. 1995) (discussing analysis of claims that counsel's ineffectiveness resulted in criminal defendant's failure to perfect direct appeal). If counsel's ineffective assistance did result in petitioner's failure to perfect a direct appeal, this would also excuse petitioner's procedural default on the remainder

of his § 2254 claims. See Romero, 46 F.3d at 1030 (if counsel's failure to perfect timely notice of appeal was ineffective assistance, then appellant has established both cause and prejudice sufficient to overcome any procedural bar to review of federal habeas claims).

In any event, habeas review of petitioner's fourth category of claims, those alleging that his guilty plea was the result of ineffective assistance of counsel, is not precluded. This court has held that state procedural rules that bar an ineffective assistance of trial counsel claim, when a defendant does not raise it on direct appeal, are inadequate to preclude federal habeas review, where those claims require fact finding beyond the appellate record and where the defendant is represented on direct appeal by the same attorney that represented his in the trial court. See Osborn v.

Shillinger, 861 F.2d 612, 622-23 (10th Cir. 1988) (citing, e.g., Kimmelman v. Morrison, 477 U.S. 365 (1986)). This is just such a case.

This court's decision in Brecheen, 41 F.2d at 1362, 1363-64, supports this conclusion. See also Nguyen, 1997 WL 693685, at *5 n.3; Brewer v. Reynolds, 51 F.2d 1519, 1522 (10th Cir.1995). In Brecheen, this court held that Oklahoma's procedural bar requiring a criminal defendant to raise on direct appeal any claims alleging the ineffectiveness of trial counsel was inadequate to preclude federal habeas review where, although the petitioner was represented on direct appeal by an attorney other than his trial counsel, the petitioner did not have an opportunity to develop additional facts on direct appeal. See 41 F.2d at 1364.

Respondents argue that this court should overrule Brecheen and Osborn, in light of the Oklahoma Court of Criminal Appeals' decision in Berget v. State, 907 P.2d 1078 (Okla. Crim. App. 1995). As a three-judge panel, we are not authorized to overrule or otherwise disregard circuit precedent. See Williams v. City & County of Denver, 99 F.2d 1009, 1021 (10th Cir. 1996). Respondents further assert that this court has scheduled oral argument in two other appeals to consider Berget's effect on Brecheen. See Appellees Br. at 12 (citing English v. Cody, No. 97-5004, and Masset v. Ogden, No. 97-5132). If, in resolving this issue in those pending appeals, this circuit modifies or alters the holdings in either Brecheen or Osborn, the district court should consider that new authority on remand.

The district court's decision dismissing petitioner's § 2254 claims alleging that the trial court lacked subject matter jurisdiction is AFFIRMED. In all other respects, the district court's decision dismissing petitioner's § 2254 claims is REVERSED, and this cause is REMANDED to the district court for further proceedings consistent with this order and judgment.

Entered for the Court

Michael R. Murphy
Circuit Judge

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

DAVID LEE SACK,	)	
	)	
Petitioner,	)	
	)	
V.	)	**No. CIV 92-586-S**
	)	**(Consolidated Case)**
RON CHAMPION, Warden;	)	
ATTORNEY GENERAL OF	)	
THE STATE OF	)	
OKLAHOMA,	)	
	)	
Respondents.	)	

ORDER

This matter is before the court on respondent's motion for summary judgment or to dismiss. On September 27, 1993, this court affirmed the Magistrate's Findings and Recommendation that petitioner's petition for a writ of habeas corpus in Case Number 92-586-S attacking his conviction in Wagoner County, Oklahoma, District Court Case Number CRF-90-24 be dismissed, because the

claims were barred by procedural default. The United States Court of Appeals for the Tenth Circuit reversed and remanded for further proceedings with regard to Petitioner's claims of ineffective assistance of trial counsel. Sack v. Champion, No. 94-7018 (10th Cir. Oct. 19, 1994).

The issue on remand focused on petitioner's claim that he was not advised of his right to appeal at the state's expense and with the assistance of appointed counsel, that his attorney failed to advise him of the advantages and disadvantages of an appeal, and that his attorney conspired with the prosecution to coerce his guilty plea. In its remand the Tenth Circuit Court of Appeals stated:

> [W]hen an ineffective assistance of trial counsel claim is predicated upon the counsel who handled the appeal or should have handled the appeal, in case none was taken, it is not realistic to expect that such a claim be raised on direct appeal. Additionally, when the communications that either occurred off the record, or did not occur at all and thus went unrecorded, there is further reason to allow the claim to be raised for the first time collaterally.

> [I]f Oklahoma bars collateral review of ineffective assistance claims, like petitioner's, that realistically could not have been raised on direct appeal—and it is not even clear that Oklahoma consistently applies such a bar—that bar would be inadequate to preclude federal habeas review of the ineffective assistance claims."

Sack v. Champion, slip op. At 7.

Subsequent to the remand the Oklahoma Court of Criminal Appeals addressed the issue of collateral review of ineffective assistance claims in Berget v State, 907 P.2d 1078 (Okla. Crim. App. 1995). In Berget the Court of Criminal Appeals expressly addressed the procedure for review of ineffective assistance of trial counsel claims such as petitioner's:

> In the event the claim raised involves facts which are not part of the designated appellate record, an appellant's proposition of error advancing this theory is a collateral attack on the judgment and sentence and is to be raised on using the appropriate vehicle, whether it be a motion for new trial, an application for post-conviction relief or some other authorized method. Regardless, the

> mechanism currently exists upon which such claims can be, and are, subject to review.

Berget, 907 P.2d at 1084.

The court further stated that "while evidentiary hearings are not conducted at the appellate level, it is within this Court's power and authority to remand cases for evidentiary hearings at the district court level when appropriate." Id.

The court finds, therefore, that the question posed by the Tenth Circuit has been answered. Oklahoma does not bar collateral review of ineffective counsel claims such as petitioner's.

In Coleman v. Thompson, 501 U.S. 722 (1991), the United States Supreme Court explicitly set forth the required analysis for a petitioner's procedural default:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and

> actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 750. . . . "[C]"ause under the cause and prejudice test must be something external to the petitioner, something that cannot fairly be attributed to him. Id. 501 U.S. at 753.

With respect to the "prejudice" prong of the "cause and prejudice" requirement, a petitioner "must shoulder the burden of showing, not merely that the errors ... created a possibility of prejudice, but that they worked to his actual and substantial disadvantage," infecting the entire **proceedings with "error of constitutional dimensions."** **United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis in original).**

The court finds that plaintiff's habeas claims with respect to his Wagoner County conviction are procedurally barred, and plaintiff has failed to show cause and prejudice or a fundamental miscarriage of justice to overcome to procedural bar. Therefore, the petition must be denied.

On April 23, 1996, this court consolidated Case Number CIV 92-586-S with Case Number CIV 94-428-B. Case Number CIV 94-428-B attacked four Muskogee County, Oklahoma, District Court cases as invalid: CRF-89-435, CRF-87-126, and CRF-85-387.

The court has carefully reviewed the record and construes plaintiff's pleadings liberally. Haines v. Kerner, 404 U.S. 519 (1972). The court finds petitioner attacked the Muskogee County convictions in CIV 94-428-S, because they allegedly were used to enhance the Wagoner County conviction in CIV 92-586-S. Further, petitioner previously asserted this same claim for relief as Ground Eight in CIV 92-586-S. The court, therefore, finds that petitioner's claims with respect to the Muskogee County convictions are **successive and must be** dismissed. 28 U.S.C. § 2254 Rule 9(b); McClesky v. Zant, 499 U.S. 467 (1991).

Accordingly, based on the foregoing reasons the court finds petitioner's claims with respect to his Wagoner County conviction are procedurally barred, and his claims with respect to his Muskogee County convictions are successive. The petition for a writ of habeas corpus is, therefore, denied.

IT IS SO ORDERED **this 17th day of January, 1997.**

/S/ FRANK H. SEAY
UNITED STATES DISTRICT JUDGE

APPENDIX C

Filed Stamped: FILED SEP 27 1993
William Guthrie
Clerk oU.S. District Court
By Deputy Clerk (illegible)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

DAVID LEE SACK,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. CIV-92-586-S**
	)	
RON CHAMPION,	)	
	)	
Respondent	)	

ORDER

On July 27, 1992, the United States Magistrate for this District filed Findings and Recommendations in this case. On August 9, 1993, the Petitioner filed objections to those Findings and Recommendations, alleging that the United States Magistrate's Findings and Recommendations

were erroneous as to the issues raised in Petitioners' Petition.

This court finds that the Findings of the Magistrate show that the record before the court specifically documents and supports the Findings and Recommendations of the United States Magistrate. The court finds the Petitioner's exceptions or objections to those Findings and Recommendations are without merit, and they are denied.

Upon full consideration of the entire record and the issues herein, this Court finds and orders that the Findings and Recommendations of the United States Magistrate be affirmed and adopted by this Court as this Court's Findings and Order, and Petitioner's writ of habeas corpus is denied.

IT IS SO ORDERED this 27 day of September, 1993.

/S/ FRANK H. SEAY
United States District Judge

APPENDIX D

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

DAVID LEE SACK,	)	
Petitioner,	)	
vs.	)	**No. CIV 92-586-NJ**
	)	
RON CHAMPION,	)	
Respondent.	)	

FINDINGS AND RECOMMENDATION

Petitioner filed an application for a writ of habeas corpus pursuant to 28 U.S.C. 2254. Respondents have filed a response to the petition, and Petitioner has filed a reply.

Respondent asserts that Petitioner's claims are barred by procedural default. The doctrine of procedural default generally prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on procedural grounds. See Murray v. Carrier, 477 U.S. 478 (1986);

Engle v. Isaac, 456 U.S. 107 (1982). Only upon a showing of "actual cause" and "prejudice" is a federal court permitted to entertain such claims. Murray, 477 U.S. at 492; Engle, 456 U.S. at 129.

"The existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded. . . efforts to comply with the state procedural rules." Murray, 477 U.S. at 488. Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id.

As for prejudice, a petitioner must show "not merely that the errors of the trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis in original).

As an alternative to showing "cause and prejudice," a petitioner may attempt to show that dismissal of his instant claims on procedural default grounds will result in a "fundamental miscarriage of justice.": Such a showing, however, is very difficult to make, as it requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. See Smith v. Murray, 477 U.S. 527, 537 (1986) (citing Murray v. Carrier, 477 U.S. at 496); see also Engle, 456 U.S. at 134-35.

The Oklahoma Court of Criminal Appeals has clearly denied Petitioner's claims on procedural grounds. Petitioner has filed a lengthy reply in this case, but has failed to adequately show cause, prejudice, or a fundamental miscarriage of justice in order to overcome the state's procedural bar. Thus, the Magistrate Judge recommends that the instant petition for a writ of habeas corpus be denied.

Parties are given ten (10) days from the date of service on Petitioner and on Respondents' counsel to file with the Clerk of the Court any objections, with supporting brief. Failure to object to the Findings and Recommendation within ten (10) days will preclude appellate review of the judgment of the district court based on such findings. 28 U.S.C. 636 (b)(1), Federal Rules of Civil Procedure 72, 6(a) and 6(e), and Local Rule 32(d).

DATED this 27th day of July, 1993.

/S/ JAMES H. PAYNE
U.S. Magistrate Judge

APPENDIX E

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DAVID LEE SACK,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PC 92-0629**
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

Petitioner has appealed to this Court from an order of the District court of Wagoner county denying his application for post-conviction relief in Case No. CRF-90-24. Petitioner pled guilty and was sentenced April 2, 1990, to forty (40) years for Murder Second Degree, AFCF Two or More, and twenty (20) years for Knowingly Possessing Oklahoma Drivers License With Photograph of Person Other Than Named Person, in accordance with a plea

agreement and with four additional counts dismissed. Petitioner did not timely appeal his conviction.

Petitioner now contends that his vehicle was illegally searched; that hospital personnel illegally searched his clothing and seized a pill; that the State wrongfully obtained confidential medical records from the hospital; that Petitioner's blood was unlawfully tested for alcohol; that his sentence was improperly enhanced; ineffective assistance of counsel at the preliminary hearing and at the hearing on a motion to suppress; that Petitioner was coerced by the sheriff into pleading guilty or face an additional attempted escape charge after Petitioner "half heartedly and resolutely wrote a letter requesting and or soliciting tools which could be interpreted as escape tools"; that he was denied a speedy trial; that his plea was unknowing, unintelligent, and involuntary; that his attorney conspired with the State to coerce Petitioner into pleading guilty; that he was incompetent to enter a plea; and that

there was no factual basis for the Trial Court's acceptance of Petitioner's guilty plea.

The Honorable G. Bruce Sewell denied Petitioner's application for post-conviction relief finding that Petitioner was represented by counsel at the time of his plea; that he was advised of his Constitutional rights and the consequences of his plea; that Petitioner made no application to timely withdraw his guilty plea; that all evidentiary matters raised by Petitioner in his post-conviction application were waived upon his plea of guilty; that all of the prerequisite factual findings and legal requirements of a plea of guilty were met; that the Petitioner was very well versed and knowledgeable of the law and facts when he tendered his plea of guilty – that Petitioner was not coerced and/or mentally incapable of making a reasonable factual decision as to his plea of guilty; that the preliminary hearing transcript clearly reflects that Petitioner had been convicted of two or more

felonies; that the record of plea transcript clearly reflects that the Petitioner understood everything that was going on and that he was desirous of obtaining a plea agreement; and that Petitioner unquestionably knew that he had ten days within which to attempt to withdraw his plea of guilty but did nothing. The District Court concluded that Petitioner is barred from asserting evidentiary issues which were not raised on direct appeal, that Petitioner freely and voluntarily tendered his plea of guilty to the charges and that he was fully competent to enter such pleas at said time.

The provisions of 22 O.S.1991, 1080, are not a substitute for a direct appeal. Maines v. State, 597 P.2d 774 (Okl.Cr.1979). Permitting one to by-pass or waive a timely and direct appeal and proceed under 22 O.S.1981, 1080, without supplying sufficient reason erodes the limitations and undermines the purpose of the statutory direct appeal. See Webb v. State, 661 P.2d 904

(Okl.Cr.1983), cert. denied, 461 U.S. 969, 103 S.Ct. 2434, 77 L.Ed.2d 1319 (1983); 22 O.S.1981, 1086.

Petitioner has failed to show that he was denied a direct appeal through no fault of his own. Smith v. State, 611 P.2d 276 (Okl.Cr.1980); 22 O.S.1991, 1086. Accordingly, the order of the District Court denying Petitioner's application for post-conviction relief is AFFIRMED.

AND IT IS SO ORDERED.

WITNESS OUR HANDS THE SEAL OF THIS COURT this 12th day of August, 1992.

/S/_____
JAMES F. LANE, Presiding Judge
/S/ _____
GARY L. LUMPKIN, Vice Presiding Judge
/S/_____
TOM BRETT, Judge
/S/_____
CHARLES A. JOHNSON, Judge

ATTEST:/S/_____
JAMES PATTERSON Clerk

I DIANA JONES. Court Clerk to Wagoner Oklahoma, hereby certify that the foregoing is a true, correct and full copy of the instrument herewith set out as appears of record in the Court clerks office of Wagoner County Oklahoma this 21st day of December, 1992

DIANA JONES, Court Clerk
By Janie Wilson Deputy

APPENDIX F

File Stamped: WAGONER COUNTY, OKLAHOMA FILED IN DISTRICT COURT MAY 11 1992 DIANA JONES, Court Clerk

IN THE DISTRICT OF WAGONER COUNTY STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	**PC 92-629**
Plaintiff,	)	
vs	)	**Case No. CRF-90-24**
	)	
DAVID LEE SACK,	)	
	)	
Defendant.	)	

FINAL ORDER OVERRULING DEFENDANT'S POST CONVICTION APPLICATION AND SUBSEQUENT RELATED MOTIONS

Now on the 6th day of May 1992 this matter comes on for decision before the undersigned judge of the District Court regarding the Defendant's Post Conviction Relief Application and subsequent related Motions. The State appears by and through Assistant District Attorney Gay Huggins; the Defendant appears in person, Pro Se and

assisted by his court-appointed counsel, Mr. Richard McLaughlin. The Court issued its rulings on the record at the time of said hearing and hereby enters the following written memorialization of findings of facts and conclusions of law regarding said matters:

PRELIMINARY FINDINGS

1. The Defendant has filed two Motions to Disqualify the undersigned Judge (January 2,1992 and April 10, 1992.) The Court has overruled said motion (Orders of January 24, 1992 and April 11, 1992.) Neither Motion to Disqualify was filed in accordance with Rule 15 of the Rules of the District Court of Oklahoma. No presentment of said motions to the presiding judge and/or Writ of Mandamus was filed pursuant to Rule 15-B of the Rules of the District Court. Therefore the issue of disqualification is moot.

2. The Court has now reviewed all of the pleadings that the defendant has filed in this case. In addition, the Court has reviewed the following documents:

A. Complete case file of CRF-90-24.

B. Transcript of the preliminary hearing conducted in this matter.

C. Transcript of the record of plea of guilty by the Defendant before the undersigned judge on the third day of December, 1990.

D. The State's Response to the Defendant's Application for Post Conviction Relief.

3. At the commencement of the hearing on May 6, 1992, the Defendant's attorney, Richard Mclaughlin announced that he felt less than competent to handle a Post-Conviction Relief matter although he had been assigned the case for approximately six (6) weeks. Although the Court does not condone the tardiness in Mr. Mclaughlin's announcement that he was not ready and prepared for this case, the Court nevertheless feels that his representation is

not necessary at this time. The Court finds that the Defendant has adequately and completely stated his factual positions and legal arguments in his Applications and related motions.

***

4. Based upon a review of all of said matters, the Court finds that there are no material issues of fact which would be appropriate for an evidentiary hearing regarding the Defendant's tendered plea of guilty. Therefore, such an evidentiary hearing is not necessary pursuant to Title 22 Section 1084.

BASIC FACTUAL BACKGROUND

5. On February 7, 1990 a two-car accident occurred on the Muskogee Turnpike in Wagoner County, Oklahoma, which resulted in the fatality of a Ms. Betty Towie. The deceased was found behind the steering wheel

of her automobile. Her infant child was also traveling with her and riding in the back seat. She was injured and transported to a hospital in Tulsa County.

6. On the 16th day of February, 1990, the Defendant received his initial appearance before the Honorable Lawrence Langley, Special Judge of the District Court of Wagoner County. The Defendant was presented with a Commitment and Notice of Rights pleading which specifically advised him of all of his constitutional rights. Furthermore, at said hearing the Defendant was appointed an attorney who represented him throughout the course of these proceedings. A copy of said Commitment and Notice of Rights form is attached hereto, marked Exhibit "A" and made a part hereof by reference.

7. The evidence presented at the preliminary hearing was strong and specific that the Defendant was found pinned behind the wheel of the other automobile at

the scene. Emergency medical personnel had to extract the Defendant from the vehicle and then life flighted him to Saint Francis hospital in Tulsa . He was seriously injured.

8. The evidence at the preliminary hearing was also strong and specific that the Defendant's automobile had crossed the center median at an excessive rate of speed and then struck Ms. Towie's vehicle. An open bottle of liquor was found in the Defendant's automobile. Also, the Defendant was found with a ficticious drivers license bearing this picture but another person's name, address, etc. A number of stolen checks were also found in the possession of the defendant.

9. At the time of this accident, the Defendant was awaiting trial on felony driving under the influence charges in Muskogee and Wagoner County respectively. Further, in 1985 he had received a felony conviction for carrying a firearm into a liquor establishment and another

felony conviction for unlawful possession of a controlled drug. In 1988, the Defendant was convicted of the felony offenses of unlawful possession of a controlled drug and unlawful possession of marijuana.

10. Therefore, during the pendency of this case the Defendant had an attorney representing him in the Muskogee County case, an attorney representing him in the Wagoner County felony driving under the influence case, and a third attorney representing him in the present case.

11. The record reflects that the Defendant pled guilty in the Wagoner County drunk driving case in April of 1990. He then pled guilty on the Muskogee County drunk driving case about one month before pleading guilty in this case.

12. The Defendant is now challenging his conviction in this case with demand that all charges arising

out of this automobile fatality and related issues be dismissed.

FINDING OF FACTS

13. On the 9th day of February, 1990, a preliminary information was filed against the Defendant. This information charged the Defendant with manslaughter in the first degree; transporting an open container of intoxicating liquor; driving under suspension; and, failure to carry insurance verification. A "second page" was attached to said information which alleged the Defendant had previously been convicted of more that two felony offenses.

14. On the 22nd day of February, 1990, the State filed an amended information which alleged the following crimes:

A. Count 1; Murder second degree, 21 O.S. 701.8 AFCF two or more.

* * *

17. At the request of the Defendant, a motion hearing and the District Court arraignment were continued to be reset upon completion of the preliminary hearing transcript. Also, the Defendant was released to the custody of the Department of Corrections pursuant to an unrelated conviction.

18. On or about June 20, 1990, the Defendant was returned to this jurisdiction and on June 25, 1990, the District Court Arraignment was conducted and the Defendant tendered a plea of not guilty and requested a jury trial. The Defendant was specifically allowed to reserve the right to present Motions to Quash and Suppress at a later date. Further, the Defendant specifically waived his right to be present at the motion hearing and shortly thereafter he was returned to the custody of the Department of Corrections.

19. On June 18, 1990, the Defendant's Motion to Suppress was overruled and the Defendant's Motion to Quash was partially sustained so as to require the State of Oklahoma to elect which of its alternative charges in count three that it would prosecute.

20. September 11, 1990, the State filed its formal information alleging the following crimes:

A. Count 1; Murder Second Degree, 21 O.S. 701.8, AFCF two or more.

B. Count 2; Possession of Forged Instrument, 21, 1579, AFCF two or more.

C. Count3; Knowingly possessing Oklahoma drivers license with photograph of person other than named person, 47 O.S. 6-301 (2D) AFCF two or more.

D. Count 4; Transporting an open container of liquor, 37 O.S. 537 (A) (7).

E. Count 5; Driving under suspension, 47 OSA 6-303.

F. Count 6; Failure to carry insurance verification, 47 O.S. 7-606.

The Final information was filed in accordance with the Court's ruling regarding the election of prosecution by the State regarding count three of the previously filed amended information.

21. On September 13th, the Defendant filed a Motion to Produce which is sustained on October 3, 1990.

22. On December 3, 1990, the Defendant appeared or jury trial at which time he tendered a plea of guilty to the crimes of second degree murder and knowingly possessing an Oklahoma drivers license with photograph of a person other than the named person. Pursuant to the plea agreement which precipitated the Defendant's guilty pleas to those two counts, the State dismissed counts two, four, five and six.

23. The Defendant has made no application to withdraw his guilty plea pursuant to the authority of Title 22 O.S. Section 1051.

24. On January 2, 1992, the Defendant commenced is first "waive" of Post-Conviction activities by filing his application for Post-Conviction Relief. Thereafter, he has filed number of various pleadings in support of his application.

25. The Court would initially note that the overwhelming majority of the Defendant's Post-Conviction Relief allegations deal with evidentiary matters. As will be discussed in the conclusions of law hereinafter, such errors are waived upon the entry of a plea of guilty.

26. Further, the Defendant makes repeated allegations as to the manner, method and propriety of the drawing of his blood at Saint Francis Hospital. The issue

of the propriety of the blood testing was specifically challenged and contested by the Defendant's attorney throughout the preliminary proceedings. Furthermore, a reading of the preliminary proceedings transcript, admittedly taken in the light most favorable to the State, would show that the Defendant voluntarily consented to the use of said blood test. However, once again it must be reiterated that such evidentiary matters were waived when the Defendant tendered his plea of guilty.

27. This Court does not now have and never has had all of the possible evidentiary facts that might bear upon the relevance or irrelevance, admissibility or inadmissibility of the blood test results. Furthermore, this Court declines to allow evidentiary presentations on these issues since the Defendant pled guilty..

28. Another major thrust of Defendant's argument is that his attorney and the prosecuting Assistant District Attorney engaged in a conspiracy to mislead and coerce the Defendant into pleading guilty. He has taken the novel approach of alleging that he purposely committed perjury when he pled guilty

29. The Court finds that the Petitioner's Application for Post-Conviction Relief and related motions can primarily be resolved by a through review of the transcript of the Defendant's plea of guilty and certain of Defendant's own exhibits. As will be stated in the conclusions of law, the Court finds that all the prerequisite factual findings and legal requirements of a plea of guilty are reflected in said transcript.

30. After carefully reviewing all of the matters, the Court finds that there are virtually only tow issues which are properly before this Court. The first is the

Defendant's competency to understand the nature and consequences of his plea negotiations and actual plea on December 3, 1990. The second concerns the voluntariness of Defendant's plea.

31. Although the Defendant now asserts that he was coerced and/or mentally incapable of making a reasonable factual decision as to his plea of guilty, the transcript of his record of plea of guilty reflects otherwise.

32. One cannot read the transcript of the Defendant's guilty plea without unequivocally arriving at the conclusion that the Defendant was very well versed and knowledgeable of the law and facts when he tendered his plea of guilty, The preliminary hearing transcript, as referred to in the record of plea transcript, clearly reflected that he had been convicted of two or more felonies. The record of plea transcript also clearly reflected that he understood everything that was going on and that he was

desirous of obtaining a plea agreement rather than risking a jury trial and more severe punishment. Clearly, the Defendant chose to accept a certain plea bargain rather than risk a possible conviction and appeal on the procedural and evidentiary arguments which he now attempts to assert.

33. The Court reiterates that it is satisfied that the Defendant's allegations of procedural and evidentiary issues that might or might not have merit are properly excluded from consideration on Post-Conviction appeals from a guilty plea. Furthermore, the Court finds that the Defendant's allegations of a conspiracy to get him to plead guilty and his willful perjury should not be allowed to challenge a guilty plea under the particular circumstances of this case.

34. Once again, one cannot read all of the Defendant's pleadings and innumerable allegations without recognizing that the Defendant's unequivocally had

personal beliefs, and other egregious activities were occurring. It is unequivocal that from shortly after this accident on February 7, 1990 until December 3, 1990, the Defendant was represented by three separate attorneys. He had been processed into the Department of Correction's custody. There is no competent evidence presented by the Defendant that he made any [unintelligible] * * * and/or complaints to any appropriate officials. He unquestionably knew he had ten days within which to attempt to withdraw his plea of guilty but did nothing.

35. Furthermore, the Court finds that the Defendant has supplied compelling evidence in his pleadings that should unequivocally and permanently close the door to the Defendant's attempts to have the charges in this case dismissed against him. Attached hereto, marked Exhibits , "C", "D" and "E", respectively are Defendant's Exhibit Numbers "32", "33", "34" and "35" of the

36. These exhibits are letters purported to have been written by the Defendant to various authorities during the week immediately preceding the Defendant's pleading guilty in this case. Exhibits "B" and "E" are addressed to "Dear Judge." The Court again states that it has never seen said letters until the Defendant's Post-Conviction Relief Application. Such a determination has been previously made by this Court in its Order Overruling Defendant's Second Motion to Disqualify entered on the 14th day of April, 1992.

37. Giving the greatest benefit of the doubt to the Defendant that said letters were in fact authored on the dates alleged on the copies that are being submitted to this

Court, these letters are in and of themselves absolute and unequivocal evidence that the Defendant was fully aware of his circumstances and conditions at the time he entered his plea of guilty. The Court does note that the last letter, Exhibit "D", is alleged to have been written by a fellow prisoner due to the allegation that Mr. Sack was unable to write at that time. The Court believes that even an uneducated, untrained eye would still come to the conclusion that all of these letters were written by the same person.

38. Again, irrespective of whether they were or not, they clearly reflect that Mr. Sack was fully aware of what he as doing during this time frame. The letters reflect that he was alleging that he was being mistreated by the jail personnel and was threatening to file civil and human rights violations lawsuits. They are virtually

unrefutable evidence that he had complete ommand of his faculties, irrespective of his possible motives.

39. The Court would reiterated that it is not acknowledging that these letters were actually in existence between the period of time of October 25,1990 to November. However, if they were, it is simply inconceivable that the Defendant could have been placed under oath and then rendered [unintelligible] clear and cogent answers that he rovided at the time the [unintelligible] tendered his plea of guilty to this Court. For ease of reference, this Court is attaching a copy of the transcript of the record of plea, marked Exhibit and made a part hereof by reference.

40. To allow the Defendant to remain silent, give specific, unequivocal and clearly rational and intelligent responses at a guilty plea and the allow him to attack that

guilty plea in the manner in which he is attempting herein would make a complete and total mockery of the system, The end result would be that a judge could never take a guilty plea which would not be subject to such attacks.

CONCLUSIONS OF LAW

41. On December 3, 1990, the Defendant tendered pleas of guilty to two separate felony offenses. The Court finds that the acceptance of said pleas of guilty were in total and complete compliance with the prerequisite set forth in the case of King v. State, 553 p.2d 529 (OKL. CR. 1976) and Coyle v. State, 706 P.2d 517 (OKL. CR. 1985.)

42. The Defendant is barred from asserting evidentiary issues which were not raised on direct appeal. Smith v. State, 462 P.2d 289 (OKL CR. 1969.) The Court specifically finds that the defendant freely and

voluntarily tendered his plea of guilty to these charges and that he was fully competent to enter such plea at said time. Embry v. State, P.2d 617 (OKL. CR. 1957.)

IT IS THEREFORE ORDERED ADJUDGED AND DECREED by the Court that the Defendant's Post Conviction Relief Application be and its hereby denied.

Entered this 6th day of May, 1992

/S/ Judge of the District Court

cc: David Lee Sack, Dick Conners, Correctional Center, P. O. Box 220, Hominy, Oklahoma, 74305

Richard Mclaughlin, Attorney at Law, P.O. Box 597, Wagoner, Oklahoma, 74467

District Attorney's Office, Wagoner County Courthouse, Wagoner, Oklahoma, 74467

DIANA ***File Stamped*: Filed In Court of Criminal Appeals State of Oklahoma August 12 1992 by James W. Patterson Clerk**
***File Stamped*: Filed in District Court AUG 14 1992 JONES, Court Clerk CF 90--24**

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID LEE SACK,	)	
Petitioner-Appellant,	)	
	)	
v.	)	**No. 97-7017**
	)	**D.C.No. 92-CV-586-S**
RON CHAMPION, Warden; ATTORNEY GENERAL OF OKLAHOMA,	)	
Respondents-Appellees.	)	

ORDER

Filed February 6, 1998

Before **BALDOCK, BARRETT,** and **MURPHY**, Circuit Judges.

The petition for rehearing filed by appellees, Ron Champion and the Attorney General of the State of Oklahoma, is denied by the panel that rendered the decision.

Entered for the Court
PATRICK FISHER, Clerk of Court
by: Deputy Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID LEE SACK,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 94-7018**
	)	**(D.C. No. CV-2-586)**
RON CHAMPION, Warden; ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,	)	**E.D. Okla.**
	)	
	)	**October, 1994**
	)	
	)	
Respondents.	)	

ORDER AND JUDGMENT*

Before TACHA and EBEL, Circuit Judges, and ROGERS,** District Judge.

**Honorable Richard D. Rogers, United States District Judge for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would

not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Petitioner David Lee Sack, an Oklahoma prisoner, appeals the dismissal of his federal habeas petition, filed pursuant to 28 U.S.C. 2254. The district court dismissed the petition on grounds of state procedural default. We exercise jurisdiction under 28 U.S.C. 2253 and reverse and remand for further proceedings.

Petitioner was involved in a car accident in 1990 that resulted in the death of the driver of another vehicle. A test of petitioner's blood revealed the presence of a drug called phentermine hydrochloride, and a blood-alcohol content of .08. Petitioner pleaded guilty to second degree murder, after former conviction of two felonies. He also pleaded guilty to knowingly possessing an Oklahoma driver's license with a photograph of a person other than the named person, based on the discovery of a fake driver's

license in his car. Petitioner received concurrent sentences of forty years for the second degree murder conviction, and twenty years for the driver's license conviction. He made no attempt to withdraw his guilty pleas, nor did he file a direct appeal.

He did file an application in state court for post-conviction relief, however, attacking the validity of his pleas. Petitioner argued, among other things, that his attorney was deliberately ineffective, acting in conspiracy with the prosecution to convict him. Denying the post-conviction application, the state district court concluded that petitioner was competent during the plea proceeding, his pleas were voluntary, and he was procedurally barred from raising any other issues because he failed to file a direct appeal.

He did file an application in state court for post-conviction relief, however, attacking the validity of his pleas. Petitioner argued, among other things, that his

attorney was deliberately ineffective, acting in conspiracy with the prosecution to convict him. Denying the post-conviction application, the state district court concluded that petitioner was competent during the plea proceeding, his pleas were voluntary, and he was procedurally barred from raising any other issues because he failed to file a direct appeal.

On appeal, petitioner argued that his failure to appeal should be excused by his own mental incompetency and by the fact that his pleas were coerced by his own attorney, who had deliberately misrepresented the evidence and the law. The Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief, ruling that a post-conviction action is not a substitute for a direct appeal and that petitioner failed to show that he "was denied a direct appeal through no fault of his own." Smith v. State, 611 P.2d 276, 277 (Okla. Crim. App. 1980); see Okla. Stat. Tit. 22, § 1086.

Petitioner then filed the present federal habeas corpus petition, raising twenty-six grounds for relief.[1] Addressing respondents' procedural bar defense, petitioner argued, among other things, ineffective assistance of counsel on appeal. He claimed that he was not advised of his right to appeal at the state's expense, with the assistance of appointed counsel, that his counsel failed to advise him of the pros and cons of appealing, and that his attorney conspired with the prosecution to coerce him to plead guilty. Petitioner also argued that the application of the procedural bar would result in a fundamental miscarriage of justice, because, as he was merely a passenger in his automobile at the time of the accident, he is factually innocent.

The matter was referred to a magistrate judge, see 28 U.S.C. § 636(b)(1)(B), who found that petitioner was procedurally barred under Oklahoma law from raising all of his claims in a collateral attack, including his ineffective

assistance of counsel claim, because he had failed to raise the claims in a direct appeal from his criminal conviction. The magistrate judge further found that petitioner "failed to adequately show cause, prejudice, or a fundamental miscarriage of justice in order to overcome the state's procedural bar." R. 21, at 2. The district court adopted the magistrate judge's recommendation to deny the habeas petition.

On appeal, many of petitioner's arguments address the merits of the numberous Fourth, Sixth, and Fourteenth Amendment violations that allegedly occurred in the underlying criminal action. This court, of course, cannot reach the merits of petitioner's federal habeas claims without addressing the procedural bar issue. See Coleman v. Thompson, 111 S.Ct. 2546, 2565 (1991). Relevant to his procedural default, petitioner argues that the state inadequately applies its bar to ineffective assistance of counsel claims; he received ineffective assistance of counsel

on appeal because his attorney coerced him to plead guilty and failed to assist him on appeal; he was incompetent to appeal; and he is actually innocent of the charges of which he has been convicted. Also, unrelated to the procedural default issue, petitioner faults the district court for erroneously denying his motion for appointment of counsel and failing to review the magistrate judge's recommendation and the record de novo.

We reject petitioner's argument that the district court erroneously denied his motion for appointed counsel. "[T]here is no constitutional right to counsel beyond the appeal of a criminal conviction, and . . . generally appointment of counsel in a § 2254 proceeding is left to the court's discretion." Swazo v. Wyoming Dep't of Corrections State Penitentiary Warden, 23 F.3d 332, 333 (10th Cir. 1994). The district court did not abuse its discretion in denying petitioner's motion.

We also reject petitioner's argument that the district court erred in reviewing the magistrate judge's recommendation. When a party files timely written objections to a magistrate judge's report, the district court must "make a de novo determination of those portions of the report or specified proposed gfindings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C); see also Summers v. Utah, 927 F.2d 1165, 1167 (10th Cir. 1991) ("De novo review is statutorily and constitutionally required. . . ."). Here, although the district court did not recite that it reviewed de novo, the court did state that it had fully considered the issues and the entire record. The court acknowledged pettioner's objections to the magistrate judge's report and found them meritless. Additionally, the court found that the magistrate judge's recommendations were documented and supported by the record. There are no circumstances indicating that the district court failed to review de novo.

Next, we consider whether the district court erred in failing to reach the merits of petitioner's federal habeas claims. Because petitioner failed to file a direct appeal, he was procedurally barred from raising his federal constitutional claims on state post-conviction application. If the state refused to hear his claims pursuant to an adequate and independent state procedural rule, federal habeas review of his claims is barred unless petitioner can show cause and prejudice, or a fundamental miscarriage of justice. Coleman, 111 S. Ct. at 2565.

The Fourteenth Amendment requires a state "'to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.'" Pennsylvania v. Finley, 481 U.S. 551, 556 (1987) (quoting Ross v. Moffitt, 417 U.S. 600, 616 (1974)). In some circumstances, a criminal defendant cannot fairly be expected to raise an ineffective assistance claim on direct appeal. See Kimmelman v. Morrison, 477

U.S. 365, 378 (1986). "Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation." Id. The Court explained that "[a] layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case." Id.[1] (citation omitted).

This circuit has noted another obstacle to raising ineffective assistance claims on direct appeal. "[I]neffectiveness claims are ordinarily inappropriate to raise on diret appeal because they require additional fact-finding." Osborne v. Shillinger, 861 F.2d 612, 623 (10th

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[1] Respondents have not asserted an exhaustion defense.

Cir. 1988). In Osborne, we reached an ineffective assistance of trial counsel claim in a 28 U.S.C. § 2254 habeas proceeding that the petitioner did not raise on his direct appeal. Id. We did not expect the petitioner to have raised the claim on direct appeal because the claim could not have been made on the basis of the trial record, and the claim was predicated on the ineffectiveness of the counsel who continued to represent petitioner on direct appeal. Id.

In the present case, petitioner's ineffective assistance of trial counsel claim is predicated on the failures of the same counsel who, he claims, should have advised him of the pros and cons of appealing, including that he could appeal without cost, with new appointed counsel. It follows from Osborne that when an ineffective assistance o trial counsel claim is predicated upon the counsel who handled the appeal or should have handled the appeal, in case none was taken, it is not realistic to expect that such a claim be raised on direct appeal. Additionally, when the ineffective

assistance claim is based on alleged communications that either occurred off the record, or did not occur at all and thus went unrecorded, there is further reason to allow the claim to be raised for the first time collaterally.

Therefore, if Oklahoma bars collateral review of ineffective assistance claims, like petitioner's, that realistically could not have been raised on direct appeal—and it is not even clear that Oklahoma consistently applies such a bar—that bar would be inadequate to preclude federal habeas review of the ineffective assistance claims. Compare Webb v. State, 835 P.2d 115, 117 (Okla. Crim.App.1992)(requiring post-conviction petitioner to show that ineffectiveness of counsel claim could not have been raised earlier with Coleman v. State, 693 P.2d 4, 6 (Okla. Crim. App. 1984)(reaching ineffective assistance of trial counsel claim asserted for first time in post-conviction action, without addressing whether the claim could have been raised on direct appeal). The district court should on

remand reach petitioner's ineffective assistance of trial counsel claims. To prevail in challenging his guilty pleas on the basis of ineffective assistance, petitioner "must show that counsel's representation fell below an objective standard or reasonableness," Hill v. Lockhart, 474 U.S. 52, 57 (1985), and "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," id. At 59. Accordingly, we REVERSE the dismissal of petitioner's complaint and REMAND for further proceedings consistent with this order and judgment.

Entered for the Court

David M. Ebel
Circuit Judge

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1992. 515 F.R.D. 470.

APPENDIX I

OKLA. STAT. TIT. 22 § 1080 (1981)

Post-Conviction Procedure Act – Right to Challenge Conviction or Sentence

Any person who has been convicted of, or sentenced for, a crime and who claims:

(a) that the conviction or the sentence was in violation of the constitution of the United States or the Constitution or laws of this state;

(b) that the court was without jurisdiction to impose sentence;

(c) that the sentence exceeds the maximum authorized by law;

(d) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(e) that his sentence has expired, his suspended sentence, probation, parole, or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(f) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;

may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence.

APPENDIX J

Okla. Stat. Tit. 22, § 1086 (1981).

§ 1086. Subsequent Application

All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

APPENDIX K

22 O.S.Supp.1990, App. Rule 4.1 (Rules of the Oklahoma Court of Criminal Appeals):

Rule 4.1. Requirements for Commencement of Certiorari Appeal

To appeal from any conviction on a plea of guilty or nolo contendere, the defendant must have filed an application to withdraw the plea within ten (10) days from the date of the pronouncement of the judgment and sentence, setting forth in detail the grounds for the withdrawal of the plea and requesting an evidentiary hearing in the trial court.

A. Evidentiary Hearing. The trial court shall hold an evidentiary hearing and rule on the application within thirty (30) days from the date it was filed. No matter may be raised in the petition for a writ of certiorari unless the same has been raised in the application to withdraw the plea. PROVIDED, HOWEVER, if the trial court fails to hold the evidentiary hearing within thirty (30) days, petitioner may seek extraordinary relief with this Court.

B. Motion for a New Trial. No motion for a new trial is required.

C. Notice of Intent to Appeal and Designation of Record. A notice of intent to appeal and designation of record shall be filed in the trial court within ten (10) days from the date the application to withdraw the plea of guilty or *nolo contendere* is denied. See Section 11, Rule 2.5(B), for procedures on counter-designation of record.

APPENDIX L

22 O.S. Supp.1997, App. Rule 4.2 (Rules of the Oklahoma Court of Criminal Appeals):

Requirements for Commencement of Certiorari Appeal

A. Application to Withdraw Plea. In all cases, to appeal from any conviction on a plea of guilty or nolo *contendere*, the defendant must have filed in the trial clerk's office an application to withdraw the plea within ten (110) days from the date of the pronouncement of the Judgment and Sentence, setting forth in detail the grounds for the withdrawal of the plea and requesting an evidentiary hearing in the trial court. See Sections 1051 and 1054 of Title 22.

B. Evidentiary Hearing. The trial court shall hold an evidentiary hearing and rule on the application within thirty (30) days from the date it was filed. No matter may be raised in the petition for a writ of certiorari unless the same has been raised in the application to withdraw the plea, which must accompany the records filed with this Court. PROVIDED HOWEVER, if the trial court fails to hold the evidentiary hearing within thirty (30) days, petitioner may seek extraordinary relief with this Court.

C. Motion for a New Trial. No motion for a new trial is required.

D. Notice of Intent to appeal and Designation of Record. A defendant seeking to appeal a denial of the application to withdraw the plea shall file notice of intent to appeal, together with the designation of record, in the trial court within ten (10) days from the date the application to withdraw the plea of guilty or *nolo contendere* is denied. It shall be the responsibility of trial counsel to file all jurisdictional documents required to seek a petition for certiorari before this court, including the notice of intent to appeal form required by Rule 1.143(C) and Rule 13.4; however, Form 13.4 can be amended to comply with the requirements for certiorari. The filing of the Notice of Intent to Appeal and Designation of Record in the district court is jurisdictional and failure to timely file constitutes waiver of the right to appeal. A certified copy of the Notice of Intent to Appeal and Designation of Record shall also be filed by trial counsel with the Clerk of this Court within ten (10) days from the date the Notice is filed in the trial court. See Section II, Rule 2.5(B), for procedures on counter-designation of record.

APPENDIX M

Okla. Stat. Tit. 22 § 1051 (1981)

§ 1051. Right to appeal – Review – Corrective Jurisdiction – Procedure – Scope of Review on Certiorari

(a) An appeal to the Court of Criminal Appeals may be taken by the defendant, as a matter of right from any judgment against him, which shall be taken as herein provided; and, upon the appeal, any decision of the court or intermediate order made in the progress of the case may be reviewed; provided further, all appeals taken from any conviction on a plea of guilty shall be taken by petition for writ of certiorari to the Court of Criminal Appeals, as provided in paragraph (b) of this section, provided, such petition must be filed within ninety (90) days from the date of said conviction. The Court of Criminal Appeals may take jurisdiction of any case for the purpose of correcting the appeal records when the same do not disclose judgment and sentence; such jurisdiction shall be for the sole purpose of correcting such defect or defects.

(b) The procedure for the filing of an appeal in the Court of Criminal Appeals shall be as provided in the Rules of the Court of criminal Appeals; and the Court of Criminal Appeals shall provide by court rules, which will have the force of statute, and be in

furtherance of this method of appeal: (1) The procedure to be followed by the trial courts in the preparation and authentication of transcripts and records in cases appealed under this act; (2) the procedure to be followed for the completion and submission of the appeal taken hereunder; and (3) the procedure to b .ollowed for filing a petition for and the issuance of a writ of certiorari.

(c) The scope of review to be afforded on certiorari shall be prescribed by the Court of Criminal Appeals.

APPENDIX N

Okla. Stat. Tit. 22, § 1054 (1981)

§ 1054. Time for Taking Appeal – Transcript – Notification of nonfiling of case made or transcript

In misdemeanor cases the appeal must be taken within one hundred twenty (120) days after the judgment is rendered. In felony cases the appeal must be taken within six (6) months after judgment is rendered. A transcript in both felony and misdemeanor cases must be filed as hereinafter directed.

It shall be the duty of the clerk of the court from which notice of appeal has been given, and in which case made or transcript has been filed and withdrawn, to notify the clerk of the Court of Criminal Appeals if a certificate from such clerk acknowledging receipt of such case made or transcript is delayed three (3) days beyond the one hundred twenty (120) days maximum time from date of judgment provided for appeal in a misdemeanor case, and of six (6) months in case of a felony case, and on notification by the clerk of nonfiling of case made or transcript in the Court of Criminal Appeals, the judgment of the trial court will be immediately carried out as provided by law.